



In the Matter of:

JOE GUTIERREZ,

ARB CASE NO. 99-116

COMPLAINANT,

ALJ CASE NO. 98-ERA-19

v.

DATE: February 6, 2004

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Dana L. Gold, Esq., Government Accountability Project, Seattle, Washington

For the Respondent:

Ellen Cain Castille, Esq., Los Alamos National Laboratory, Los Alamos, New Mexico

ORDER AWARDING ATTORNEYS' FEES AND COSTS

This case arose out of a complaint Joe Gutierrez filed claiming that his employer, Los Alamos National Laboratory (LANL or Laboratory) violated the employee protection (whistleblower) provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (West 1995) (ERA or Act), when it added a negative comment to his performance evaluation and gave him a reduced pay increase in 1997. After a formal hearing, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order finding that LANL violated the Act and recommending relief for Gutierrez. The ALJ recommended a retroactive 4% salary increase, reimbursement of used vacation days, expungement of the negative comment from the performance evaluation and an award of attorneys' fees and costs in the amount of \$49,104.37. The ALJ also recommended an award in the amount of \$15,000 for emotional distress.¹

¹ The ALJ issued an August 16, 1999 recommended decision and order approving attorneys' fees and costs. An electronic copy of both of the ALJ's recommended decision and orders is available at the Office of Administrative Law Judges' website: <http://www.oalj.dol.gov/public/wblower/refrnc/eralist5.htm>.

On November 13, 2002, we issued a final decision and order, affirming in part and reversing in part, the ALJ's Recommended Decision and Order in this case. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19.² With the exception of the award for emotional distress, we affirmed the ALJ's findings. We reversed the award for emotional distress because the record lacked any supporting evidence for the award.

The Secretary of Labor "at the request of the complainant shall assess against the person against whom an order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C.A. § 5851(b)(2)(B). We granted the Complainant 20 days from the date of our Decision and Order to submit to this Board an itemized petition for additional attorneys' fees and other litigation expenses incurred on or after June 10, 1999, and directed the Complainant to serve the petition on the Respondent, who was given 30 days after issuance of our Decision and Order to file objections to the petition with the Board. The Complainant filed his petition on January 3, 2003. The Respondent did not object to the fee petition.

The Government Accountability Project (GAP) represented the Complainant during the appeal process. GAP has submitted a fully itemized and documented fee petition for work performed on the appeal of the ALJ's decision. Although the Respondent has not opposed the petition, we review it for legal sufficiency.

The Secretary employs the lodestar method to calculate attorneys' fees, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. *Jenkins v. EPA*, No. 92-CAA-6, electronic slip op. at 2 (Sec'y Dec. 7, 1994), citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. As we noted, when reviewing the ALJ's award of attorneys' fees below, "complainant's attorney fee petition must include 'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, electronic slip op. at 11 (ARB Nov. 13, 2002). See also *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-5 (ARB Oct. 28, 2003); *Fabricius v. Town of Braintree/Park Dep't*, ARB No. 97-144, ALJ No. 1997-CAA-14 (ARB Feb. 9, 1999). If the documentation of hours is inadequate, the award may be reduced accordingly. *Hensley v. Eckerhart*, 461 U.S. at 433. We find the level of detail in the descriptions of the services provided contained in GAP's petition to be adequate.

² An electronic version of the Board's decision, in PDF format, is located at http://www.oalj.dol.gov/public/arb/decsn2/99_116a.erap.pdf.

GAP has claimed an hourly rate of \$200 to \$250 for its attorney, based upon the level of his or her experience. We find that an hourly rate of \$200 to be appropriate for Ms. Gold. We find an hourly rate of \$250 appropriate for Mr. Sheridan and Mr. Taylor based upon their years of practice and expertise. An hourly rate of \$50 for Ms. Sherman is appropriate.

Although the Complainant lost the award of compensatory damages, he still achieved significant remedies and remains the prevailing party. We decline to make a downward adjustment for work performed on the now-unsuccessful argument concerning compensatory damages. *See Hensley v. Eckerhart*, 461 U.S. at 435 (attorneys' fees should not be reduced simply because plaintiff failed to prevail on every contention raised, where plaintiff obtains otherwise an excellent result). *Cf. Pogue v. United States Dep't of the Navy*, No. 87-ERA-21, electronic slip op. at 14 (Sec'y Apr. 14, 1994) (Labor Secretary rejected respondent's challenge to an award of attorneys' fees award in case where, although no damages were awarded, the complainant was more than minimally successful because the Secretary found a violation of the CERCLA and because discriminatory disciplinary actions were ordered expunged and the complainant was awarded a retroactive within grade increase, transfer to a comparable job and training).

We thus **GRANT** the Complainant's unopposed petition for attorneys' fees and costs in the amount of \$19,294.55.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge